No. 16,185

United States Court of Appeals

For the Ninth Circuit

FRED R. DICKSON, Warden of the California State Prison at San Quentin, California,

Appellant,

vs.

RAYNA TOM CARMEN,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was invoked under 28 U.S.C. 2241. It was appellee's theory that the commitment under which Rayna Tom Carmen was being held by Fred R. Dickson, warden of the California State Prison at San Quentin, California, was void because he is an "Indian" and the crime occurred in "Indian Country" and exclusive jurisdiction exists in the Federal courts. He contends that he is held "in violation of the Constitution of the United States" as that term is used in 28 USC 2341 (3).

The petition for writ of habeas corpus was filed in the United States District Court on February 11, 1958 by Rayna Tom Carmen. (R 3-7.) The court entered an order on February 12, 1958 dismissing without prejudice and granted petitioner 20 days in which to amend his petition. (R 8.)

Thereafter his amended petition for writ of habeas corpus was filed on April 2, 1958. (R 9-39.) An order to show cause was issued by the Honorable Louis E. Goodman, District Judge, requiring respondent to appear on the 23rd of April, 1958. (R 34.) Return to the order to show cause was filed by respondent on April 23, 1958. (R 34-54.)

The transcript of the trial in the criminal proceeding in the California Superior Court was filed with the court pursuant to the case of *Brown v. Allen,* 344 US 443. (R 91.) Likewise, the reporter's transcript of the proceedings before the referee in the State habeas corpus action was filed with the District Court pursuant to *Brown v. Allen,* 344 US 443. (R 91.) Thereafter, the matter was argued at length before the court. On September 11, 1958 the District Judge filed an opinion and order granting a writ of habeas corpus. (R 54-76.) The District Court, on September 12, 1958, entered an order directing the release of petitioner from custody. On September 16, 1958, the District Judge denied appellant's application for certificate of probable cause. (R 78-83.)

On September 15, 1958 a notice of appeal was duly filed. (R 84.) A statement of points was filed on October 3, 1958. (R 84-86.) A certificate of probable

cause was obtained from this court. (R 107-108.) This appeal is taken pursuant to 28 USC 2253.

The validity of the following statutes as interpreted and applied by the United States District Court is involved in this appeal:

18 USC 1151; 63 Stat. 94.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 USC 1152, 62 Stat. 757.

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

18 USC 1153, 63 Stat. 94.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder,

manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 USC 3242, 63 Stat. 96.

All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

STATEMENT OF THE CASE.

Appellee, Rayna Tom Carmen, is currently confined in the California State Prison at San Quentin on judgments of conviction of first degree murder and assault with intent to commit murder. He was first convicted in the Madera County Superior Court in 1950 of murdering Wilbur Dan McSwain. At his first trial it was alleged and proved that the crimes had been committed in Madera County. On automatic appeal to the California Supreme Court the assault conviction was affirmed and the murder conviction reversed. See *People v. Carmen,* 36 Cal. 2d 768, 228 P.2d 281.

Carmen was retried in the Superior Court of Madera County and again was convicted of first degree murder for the killing of Wilbur Dan McSwain. It was again alleged and proved that the murder had been committed in Madera County. At the time of the oral argument on the automatic appeal it was suggested for the first time that facts might be produced to show that the crime was committed on a small tract of land which constituted an Indian allotment and that exclusive jurisdiction might be vested in the federal courts. Application to produce additional evidence was denied by the Supreme Court on the ground that its jurisdiction extended only to the record before it. That court affirmed the conviction of murder in the first degree. See *People v. Carmen,* 43 Cal. 2d 342, 273 P.2d 521.

The transcript of the second trial in Madera County was filed with the District Court pursuant to *Brown v. Allen,* 344 US 443. (R. 91; R 99-100.)

Petitioner thereafter commenced habeas corpus proceedings in the California Supreme Court. He contended that he was an "Indian" and that the crime occurred in "Indian country" and that as a result the Madera County Superior Court did not have jurisdiction.

The California Supreme Court appointed a referee. The referee held hearings in Sacramento, Madera, and San Quentin. The reporter's transcript of the oral testimony before the referee was filed in the District Court pursuant to *Brown v. Allen,* supra, and pursuant to stipulation. (R 91, R 99-100.) This

transcript will hereinafter be referred to as Calif. H.C.R.

The California Supreme Court denied the writ of habeas corpus on the ground that the matter should have been raised at the time of the trial in the Superior Court of Madera County and that Carmen, having had the opportunity to so raise the matter as a matter of defense in the trial court, was precluded from thereafter raising it. That decision is reported as *In re Carmen,* 48 Cal. 2d 851, 313 P.2d 817 (cert. den. without prejudice 355 US 954).

Carmen filed a petition for writ of habeas corpus in the United States District Court and said petition alleged that Carmen was an "Indian" and that the crime occurred within "Indian country", and that therefore exclusive jurisdiction existed in the federal courts. (R 14-15.) Petitioner also contended that California's procedural rule which required him to raise the matter in the trial court was unconstitutional. (R 15.)

Respondent filed a return setting up the commitments referred to herein. (R 34-54.) After oral argument, and filing of written points and authorities, the court entered an opinion and order on September 11, 1958 finding for Carmen and issuing the writ of habeas corpus. (R 54-76.)

The question involving the contention that Carmen is an "Indian" was raised by the petition, was raised at the oral argument and in the points and authorities, and was discussed in the judge's opinion. (R 14-15; R 54-76.)

The question concerning the definition of "Indian country" and the exclusive nature of the federal jurisdiction over said Indian country (18 U.S.C. §§ 1151, 1152, 1153, 3242) was raised by the petition, at oral argument, by the points and authorities, and was discussed in the judge's opinion. (R 14-15; R 54-76.)

The question concerning the validity of the state procedural rule requiring Carmen to raise the contention that he was an Indian and that the crime occurred in Indian country as a matter of defense at the time of trial or be thereafter precluded from raising the matter, was raised in the petition, at the oral argument, in the points and authorities, and was discussed in the judge's opinion. (R 15; R 54-76.)

The question concerning the interpretation of federal statutes so as to grant the state concurrent jurisdiction and the contentions concerning the unconstitutionality of the statutes as interpreted to vest the federal courts with exclusive jurisdiction over the murder by Carmen was raised at the oral argument, in the points and authorities, and is discussed in the opinion of the trial court. (R 54-76.)

SPECIFICATION OF ERROR.

The points upon which appellant Fred M. Dickson, warden of the California State Prison at San Quentin, will rely on appeal are:

1. The District Court has erroneously concluded that Carmen may raise the question on writ of habeas corpus that he and his victim were "Indians" within

the meaning of the federal statutes and decisions and that the crime occurred in "Indian country", and that the Superior Court of the State of California, in and for the County of Madera was without jurisdiction to try him for murder.

2. The District Court erred by not concluding that Carmen's failure to raise the question of his status, the victim's status and the locale of the crime at the proper time under State procedure precludes him from raising the question in the United States District Court.

3. The District Court erred in its failure to give any consideration to the effect on the doctrine of the exhaustion of State remedies of Carmen's failure to properly raise the question in the State courts.

4. The District Court has erred in that its findings of fact that Carmen is an "Indian" and that the murder occurred in "Indian country" are not supported by the evidence.

5. The District Court has erred in that its findings of fact that Carmen is an "Indian" and that the murder occurred in "Indian country" are incorrect conclusions of law.

6. The District Court has erred as a matter of fact and as a matter of law in determining that Carmen and his victim were "unemancipated tribal Indians" or "Indian wards" within the meaning of Federal statutes and decisions.

7. The District Court has erroneously concluded that the locale of the crime, an allotment in trust to a relative of the deceased, is Indian country.

8. The District Court erred in concluding that the Federal statutes involved grant the Federal government exclusive jurisdiction over crimes in the Indian country, rather than concurrent jurisdiction with the State.

9. The District Court has erred in failing to determine that Congress does not possess the constitutional power to pass a special penal law which is applicable to the crime and the locale here involved which excludes application of State laws, since there is a constitutional basis for only a limited Federal jurisdiction over California Indians.

ARGUMENT.

I.

PROCEDURAL RULE FOLLOWED BY CALIFORNIA IN THE PRESENT CASE IS THE SAME RULE FOLLOWED BY THE FEDERAL COURTS; THE PROCEDURAL RULE IN QUESTION IS NOT IN VIOLATION OF DUE PROCESS; CARMEN'S FAILURE TO RAISE THE MATTER AT THE PROPER TIME UNDER STATE PROCEDURE PRECLUDES HIM FROM RAISING THE QUESTION IN THE DISTRICT COURT.

In discharging the writ of habeas corpus the California Supreme Court determined that a final judgment of conviction cannot be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction or lack of jurisdiction because of the status of the petitioner, where there is no defect in jurisdiction on the face of the record and where no exceptional circumstances exist.

Federal courts, as well as many State courts, follow an identical rule. See *Toy Toy v. Hopkins,* 212 U.S. 542 [Indian jurisdiction case]; *Davis v. Johnston,* 144 Fed. 2d 862 (9th Cir., 1944) [Indian jurisdiction case]; *Hatton v. Hudspeth,* 99 Fed.2d 501 (10th Cir., 1944) [Indian jurisdiction case]; *Ex parte Savage,* 158 Fed. 205 (Cir. Ct. D. Kansas, 1908) [Indian jurisdiction case]; *Rodman v. Pothier,* 264 U.S. 399; *In re Lincoln,* 202 U.S. 178; *Walsh v. Johnson,* 115 Fed. 2d 806 (9th Cir., 1940); and *Walsh v. Archer,* 73 Fed. 2d 179 (9th Cir., 1934) [territorial jurisdiction over vessel]. Also see *State v. Utecht,* 220 Minn. 431, 19 N.W.2d 706 [Indian jurisdiction case]; *Lehman v. Sawyer,* 106 Fla. 396, 143 So. 310 [territorial jurisdiction]. Such rule is the long-established and widely followed rule.

The California Supreme Court in the present case simply followed the long-established rule. It has always been the general rule that a defect in jurisdiction which appears on the face of the record may be raised at any stage of the proceeding or by a collateral attack. However, where the alleged defect in the jurisdiction does not appear on the face of the record, it may not be raised by a collateral attack except in exceptional circumstances. This rule is expressed in many general axioms of the law of habeas corpus; for example, the writ of habeas corpus should not do service as a demurrer. The writ of habeas corpus is not a substitute for an appeal. Habeas corpus may not be used as a substitute for a trial of a controverted question of fact. It has long been the law that all matters must be raised at the earliest moment or be

deemed waived. See *Brown v. Allen,* 344 U.S. 443, 486, 503 (1953). Also see *Dusseldorf v. Teets,* 209 F. 2d 764 at 767 (9th Cir.); *Burrall v. Johnson,* 134 F. 2d 614. Also see *Egan v. Teets,* 251 F.2d 571 at 576.

The exceptional circumstances which void the operation of the general rule have all been matters where, by the very nature of the alleged denial of due process, or other jurisdictional defect in the proceedings, the defendant was without opportunity to raise the matter at an earlier time. Thus, in *Mooney v. Holohan,* 294 U.S. 102 (1934), according to the allegations, the defendant had no knowledge of the alleged knowing use of perjured testimony at the time of trial. Under these circumstances he could not raise the matter at the trial. Likewise, in *Moore v. Dempsey,* 261 U.S. 886, at 888 (1922) [mob domination of the trial precluded the defendant from requesting delay or change of venue], the very nature of the denial was such as to prevent the defendant's counsel from raising the matters at the proper time. Likewise, all of the denial of counsel cases are exceptions to the general rule because, by the very nature of the denial of counsel, the defendant is denied the opportunity to raise the constitutional question at issue.

The present decision of the California Supreme Court is a simple application of these principles. In the present case no exceptional circumstances existed which would permit the applicant to collaterally attack the judgment.

The fact of the record in the State court does not even hint at a lack of jurisdiction in the Superior

Court of Madera County over the offense committed by Carmen. The term "face of the record" as used in habeas corpus proceedings means the clerk's transcript of proceedings—the indictment, information, or other pleadings. See *Hatton v. Hudspeth,* 99 Fed.2d 501 (10th Cir.). However, even if the "face of the record" be deemed to include the transcript of the proceedings of the trial, there is nothing in the transcript which indicates a lack of jurisdiction in the Superior Court of Madera County. The facts, as set out in the reporter's transcript—an exhibit is in this case—simply indicate that Carmen shot McSwain, an Indian, in the County of Madera at a place approximately three miles from the town of North Fork near the McSwain residence. Inferentially, the record shows that Carmen was an Indian; that is, Carmen testified that he at one time attended an Indian school. There is nothing in the record that establishes that the crime occurred on land which was allotted to McSwain's parents who were Indians and that the title was held in trust by the Federal Government. There is no indication that the crime occurred in such a location, and there is no evidence as to the nature of the title to the land on which the shooting occurred. Likewise, the only references direct and indirect to the status of the persons involved, the petitioner, Carmen, and his victim, McSwain, are merely references to the racial descent of those persons. The record is absolutely void of any evidence showing or even hinting at the fact that these persons are "unemancipated" or "ward" or "tribal" Indians.

The question that Carmen now seeks to raise is dependent upon questions of fact which should have been determined by the jury. There is certainly no question that a Superior Court of the State of California has jurisdiction over a criminal prosecution for murder occurring within the county. When, as here, the subject matter is within the general jurisdiction of the trial court, the claim of want of jurisdiction by reason of the existence of exceptional or peculiar circumstances must be raised at the trial. It has even been held that if the defendant wishes to rely on the fact that the offense occurred outside the State, he must prove the fact as a matter of defense. *In re Carmen,* 43 Cal. 2d 851, 313 P.2d 817. See *State v. Davis,* 203 N.C. 113, 164 S.E. 737 at 744, cert. den. 287 U.S. 649; *Lehman v. Sawyer,* 106 Fla. 396, 143 So. 310 at 313.

Thus, the question as to whether Carmen and his victim were unemancipated tribal Indians and the question as to whether the crime occurred in the "Indian country" are questions of fact which should have been raised in the trial court. These are matters of defense. That this is the rule adopted in California by the California Supreme Court is clear. Carmen's failure to utilize the proper State procedure to raise the question precludes Carmen from raising the question on habeas corpus.

Carmen's failure to use the available remedy of raising the matter in the trial court may be deemed either a waiver of his right to raise the question or

may be deemed a failure to exhaust his State remedies within the meaning of 28 U.S.C. 2254.

The United States Supreme Court in the case of *Brown v. Allen,* 344 U.S. 443 at 486-87, stated as follows:

> Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed.

Also see the similar language in the same case at page 503, which is as follows:

> ". . . Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann,* 317 U.S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum,* 237 U.S. 309, 343. When a State insists that a defendant be held to this choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived

his claim and thus have no right to assert on federal habeas corpus. . . ."

The District Court has not given proper consideration to the effect of Carmen's failure to properly raise the question in the state courts. The District Court has not discussed the doctrine of the exhaustion of state remedies in this regard, nor has it adequately discussed the doctrine of waiver.

II.

THE PETITIONER AND THE DECEASED WERE EMANCIPATED INDIANS, THEY WERE NOT INDIAN WARDS, AND THEY WERE NOT MEMBERS OF AN INDIAN TRIBE WITHIN THE MEANING OF STATUTES OR DECISIONS; THE DISTRICT COURT ERRED AS A MATTER OF FACT AND LAW IN DETERMINING THAT THIS PETITIONER WAS AN "INDIAN".

There is no evidence in either the trial record or the record of proceedings on habeas corpus that Carmen and McSwain were Indians within the meaning of the Federal statutes and decisions. An Indian who has been emancipated in some manner as, for example, by severing tribal relations and taking on civilized habits are not Indians within the meaning of the Federal statutes. See 25 USC section 349; *Louie v. United States,* 274 F. 47, 49 (murder); *People v. Ketchum,* 73 Cal. 635, 638-639 [15 P. 353]; *State v. Bush,* 195 Minn. 413 [263 N.W. 300, 302-303]; *State v. Campbell,* 53 Minn. 354 [55 N.W. 553, 554, 21 L. R.A. 169]; *State v. Monroe,* 83 Mont. 556 [274 P. 840, 842-843] (manslaughter); *People v. Living-*

stone (Sup. Ct., N.Y.), 123 Misc. 605 [205 N.Y.S. 888, 894-895]; *State v. Nimrod,* 30 S.D. 239 [138 N.W. 377, 378-379]; *State v. Howard,* 33 Wash. 250 [74 P. 382, 384-385] (murder); see also *Irvine v. District Court,* 125 Mont. 398 [239 P.2d 272, 275] (burglary); *State v. Big Sheep,* 75 Mont. 219 [243 P. 1067, 1070, 1071].

The District Court erred in determining that Carmen was an "Indian ward" or "unemancipated Indian". The District Court erred in determining that the Mono Indians have a tribal organization within the contemplation of the statutes or decisions. The evidence in the California habeas corpus proceeding, the transcript of which proceeding was placed before the District Court pursuant to *Brown v. Allen,* 344 US 443, establishes that the Mono Indians have no organization; they have no chiefs (Calif. H.C.R. 135: 21; 105:20); they have no rules and regulations, and they impose no sanctions (Calif. H.C.R. 101:12-17; 102-103:6). In fact, said Indians are less organized than any other racial group.

There is evidence to substantiate the existence of certain customs followed by Mono Indians. However, it is submitted that the evidence establishes that many of these customs are limited to the elderly Indians. It is also submitted that said customs, such as gathering acorns, are not tribal in nature. They differ only slightly from similar customs of other racial groups which have no organizational feature.

It is submitted that the finding of the District Court that Carmen had never severed tribal relations or become otherwise emancipated is not supported by the

evidence. Of course, this question turns on the meaning of the words "severed" and "emancipated". It is submitted that Carmen, according to the District Court's findings, could no more emancipate himself or sever tribal relations than he could repudiate his descent. (Calif. H.C.R. 131:6-15.) The evidence established that there were no sanctions for failure to attend what the state referee described as the main distinguishing tribal feature, the burial ceremony (e.g., 131:16-21). Perhaps a person in Carmen's tribe could become emancipated by boycotting the funeral service where attendance was voluntary. It is submitted, however, that attendance was only natural and the ceremony was not unlike the individualistic ceremonies of other racial groups.

Neither Carmen nor his victim was ever controlled or supervised in any way by either an Indian organization or by the Bureau of Indian Affairs. The record establishes that Carmen was partially educated in the State public schools (Calif. H.C.R. 129:18), was committed to a State hospital (Calif. H.C.R. 121:7), served in the U. S. Army (Calif. H.C.R. 123:3), draws disability pay from the Bureau of Veterans Affairs (Calif. H.C.R. 137:21), voted (Calif. H.C.R. 131-132), and was employed in various occupations in and around North Fork, Madera County (Calif. H.C.R. 132:16). He was subject to no restrictions on account of his race, legal or otherwise. (Calif. H.C.R. 106-107.) He was free to do as he pleased within the limits of the law without interference by the "tribe". (Calif. H.C.R. 102.) He was thus emancipated within legal contemplation.

III.

THE DISTRICT COURT ERRED IN DETERMINING THAT AN ALLOTMENT FROM THE PUBLIC DOMAIN IS NOT PART OF THE INDIAN COUNTRY.

A. The phrase "the Indian titles to which have not been extinguished" has been used for 120 years to define the term "Indian country".

Section 1151, U.S.C. Title 18, defines Indian country to include "all Indian allotments, Indian titles to which have not been extinguished". This specific reference to "allotments" occurred for the first time in 1948.

The phrase which refers to the extinguishment of Indian title has a Congressional and judicial history extending back to 1834. (4 *Stat.* 729.)[1] In the report of Committee of Indian Affairs to the House of Representatives concerning 4 *Stat.* 729, we find the following commentary:

> "Indian country . . . will include all of the territory of the United States west of the Mississippi, not within Louisiana, Missouri, and Arkansas, and those portions east of that river, and not within the limits of any state, to which the *Indian title is not extinguished.* The southern Indians are not embraced within it. Most of them

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[1]This phrase also appears in the Northwest Ordinance of 1787, 1 Stat. 51, as follows:

> For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof—and he shall proceed from time to time as circumstances may require, to lay out the parts of the district *in which the Indian titles shall have been extinguished,* into counties and townships. . . . [Emphasis added.]

have agreed to emigrate. To all their lands, with exception to those of a part of a single tribe, the Indian title has been extinguished; and the states in which the Indians of that excepted tribe remain, have extended their laws over them.

"This act is intended to apply to the whole Indian country, defined in the first section. On the west side of the Mississippi its limits can only be changed by a legislative act; on the east side of the river it will continue to embrace only those sections of the country not within any state to which the *Indian title shall not be extinguished.* The effect of the extinguishment of the Indian title to any portion of it, will be the exclusion of such portion from the Indian country. The limits of the Indian country will thus be rendered at all times obvious and certain."

House Report No. 474, 23d Cong., 1st Sess., Vol. IV, May 20, 1834.

Likewise, numerous cases have had occasion to discuss this phrase. For example, *Bates v. Clark,* 95 U.S. 204, 209, discussing the definition of the Indian country, states as follows:

". . . The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the *Indian title had not been extinguished,* and they continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress a different rule was made applicable to the case . . ."

For other examples of the judicial use of the phrase "Indian title" see the following cases:

Clairmont v. United States, 225 U.S. 551, 557, *Ex parte Nowabbi,* 61 Pac.2d 1150; *Tooisgah v. United States,* 185 Fed.2d 93, at 98.

The phrase "Indian title" originally referred to land over which the Indian had uninterrupted use and occupancy. However, *Donnelly v. United States,* 228 U.S. 243, held that the statutorily recognized reservations constituted Indian country as well as did the land to which the Indians retained their original right of use and occupancy.

The present meaning of the term "Indian title" is best stated in the case of *United States v. Tillamooks,* 329 U.S. 40, at 52, footnote 50. This opinion states as follows:

> "Other cases also draw no distinction between the original Indian title and a recognized Indian title. The Indian title as against the United States was merely a title in right to perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such a right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the land for the use and purposes designated. *Spaulding v. Chandler,* 160 U.S. 394, 403 (1896). Of similar tenor is *Connelly v. Balinger,* 216 U.S. 84, 91 (1910)."

B. House Report 304, 80th Congress, indicates that Indian Allotments were included in the definition of Indian country on the basis of the decision in United States v. Pelican.

In 1948 Indian allotments were included for the first time in the statutory definition of Indian country. In this definition Congress made a deliberate choice of the phrase "the Indian titles to which had not been extinguished." By this phrase, Congress was referring to allotments of land carved out of territory over which the Indians had uninterrupted use and occupancy and to allotments of land carved out of a statutorily-recognized Indian reservation.

This view finds convincing support in *House Report No. 304,* 80th Congress, page 492. That report at page 492 states that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican,* 232 U.S. 442. The clause under discussion was intended to *codify* the *Pelican* rule, *not extend it.*

Thus, the inquiry turns upon a delineation of the rule in the *Pelican* case. That case determined that allotments made from lands which formerly comprised Indian country continue to be Indian country. That this is a correct statement of the holding can be demonstrated. First, the court at page 445 (232 U.S. 442), states the question before it as follows:

> "The inquiry then, is whether, with respect to the part of the original reservation that is comprised in the described allotment, the United States has lost the jurisdiction which it formerly had."

Answering this query, the court, at page 449, stated:

> ". . . The lands which, *prior to the allotment* undoubtedly formed part of the Indian country still *retained* during the trust period of distinctly Indian character . . ." (Emphasis supplied.)

Cases which followed *Pelican v. United States* consistently interpreted that case as applying only where the allotment was carved out of the Indian reservation or where the allotment was carved out of land over which the Indians had original use and occupancy. *State v. Muskrat,* 179 Minn. 180, 222 N.W. 611. *State v. Shepard,* 239 Wis. 345, 300 N.W. 305 [allotment of land not previously reservation, *Pelican* distinguished not applicable].

Also see *Tooisgah v. United States,* 186 Fed.2d 93. In that case the court acknowledged the rational distinction between allotted lands carved from the reservation "as in the *Pelican* case, . . . and an allotment of lands *Indian title to which* had not been extinguished before or subject to allotment." (Emphasis supplied.)

The court continued by stating:

> "It is argued, with reason that with the extinguishment of the Indian title to all lands in the reservation it no longer retained its Indian character, and therefore ceased to be Indian country."

It should appear beyond dispute when the Congressional Report stated that it was codifying the rule in the *Pelican* case and when Congress deliberately selected the phrase "all Indian allotments, Indian titles

to which have not been extinguished'' Congress intended to include within Indian country allotments from lands which comprised the statutorily-recognized Indian reservation and allotments from lands over which the Indians have had an uninterrupted use and occupancy. This phraseology shows a conscious intent to exclude allotments out of the public domain generally.

Indeed, had Congress meant something else it could easily have used another phrase such as ''while title is held in trust'' or ''while title is held subject to restrictions''. Instead, Congress has deliberately selected a phrase with a long legislative and judicial history including a specific history in reference to the decision in *Pelican v. United States,* 232 U.S. 442, which the statute purportedly codified.

The allotment upon which the murder of Dan McSwain occurred was part of a general public domain and not ''Indian country'' before allotment in trust to the Indian Maggie Jim and heirs. Any Indian title to this land which may have existed was extinguished long prior to the allotment. Thus, 18 U.S.C., §§ 1151, 1152, and 1153, do not apply.

C. The phrase ''Indian titles to which have not been extinguished'' is a limitation of the phrase ''all allotments''.

Section 1151, U.S.C. Title 18, defines Indian country to include ''all Indian allotments, the Indian titles to which have not been extinguished''. It is clear that the phrase ''Indian title'' is a limitation and exception to ''all allotments'' otherwise the statute would simply have used the term ''all allotments''.

The phrase "the Indian titles which have not been extinguished" has at least three possible meanings. First the phrase "Indian title" could possibly mean title in the individual Indian owner. This would hardly be a limitation on the phrase "all allotments". This interpretation also requires an unhistorical interpretation of the phrase "Indian title".

Secondly, this phrase could possibly have been intended to mean "while title is held in trust for the Indians or while title is subject to restrictions". This, however, would not be a modification of the phrase "all allotments" since the land would cease to be an allotment when the title was given to the Indian in fee simple.

The third possibility is that this phrase was intended to include within Indian country, all allotments from reservations and from land over which the Indians have had an uninterrupted use and occupancy.

By this construction public domain allotments are excluded from Indian country. This third possibility is the sense in which Congress and the courts have used the phrase "Indian title" for 120 years.

It is significant to note the great weight attached by the Solicitor of the Interior Department to the absence of the modifying phrase "the Indian titles to which have not been extinguished" in interpreting which is now subdivision (a) of section 1151, U.S.C. Title 18. In this regard the Solicitor stated:

> "The probable judicial construction to the amendment would be that the amendment was intended to include within federal jurisdiction all

rights-of-way because of the previous jurisdiction over rights-of-way in Indian reservations. Prior to the passage of the amendment the courts had concluded that rights-of-way to which the Indian title had not been extinguished remain part of the reservation and within federal jurisdiction, whereas other rights-of-way to which such title had been extinguished was subject to state jurisdiction. The court would presume that in view of this state of the law any amendment referring to rights-of-way generally would be intended to provide a uniform rule. If only a statement of existing law had been intended, the reference in the amendment would rather have been to rights-of-way to which the *Indian title had not been extinguished,* or no mention of the subject would have been made at all." (Emphasis added.) (*Memo. Solicitor Interior Department,* July 3, 1940.)

See *Cohen, Handbook of Federal Indian Law,* 1942 Ed., page 358.

The proper definition of the phrase "the Indian titles to which have never been extinguished" is an important question in California as well as the rest of the states. There are two basic types of allotments, allotments from the public domain and allotments from Indian reservations. There are 905,037 acres of land allotted from public domain in the United States. There are 11,728,548 acres of land allotted from Indian reservations in the United States. There are 56,325 acres of land allotted from the public domain in California. There are 53,750 acres of land allotted from Indian reservations in California. *House Re-*

port 2503, 82nd Congress, Second Session, pages 67 and 72.

Certainly Congress did not intend to scatter islands of exclusive Federal jurisdiction throughout the national forests and throughout a community such as North Fork, where the Indians live on their allotments in areas surrounded by non-Indians.

Since the 1953 legislation there is no question as to California's jurisdiction over crimes in the Indian country. However, Indian liquor legislation utilizes this same definition of "Indian country". *Public Law 277,* 1953. That legislation, however, grants the Indians local option in the Indian country. Thus, if an allotment from the public domain is Indian country, Maggie Jim's heirs and others in a like position may exercise their option so as to permit sale of liquor on their allotments.

Thus, in the Sierra National Forest where there are at least 18 allotments, the individual Indian owners could determine the particular brand of liquor regulation applicable to their allotments. Some might permit on-sale liquor regulations, others might permit off-sale liquor regulations. The variations in liquor regulation could be as numerous as the individual allotments.

IV.

THE FEDERAL STATUTES DO NOT WARRANT THE INTERPRETATION THAT THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER INDIAN COUNTRY.

The federal statutes, *18 U.S.C. 1150-1153,* and *3242,* do not warrant the interpretation that exclusive jurisdiction is vested in the federal courts.

Section 1152 reads in part:

> "Except as otherwise expressly provided by law, the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country."

The words "sole and exclusive" do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. *In re Wilson,* 140 U.S. 575, 578, *Ex parte Nowabbi,* 61 Pac.2d 1139 at 1150 (Okla.). Compare *State v. McAlhaney,* 220 N.C. 387, 17 S.E.2d 352.

Likewise, secs. 1153 and 3242 provide that all Indians committing designated offenses within Indian country "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States".

These provisions are a mere direction that the substantive and procedural laws which apply to certain crimes within the exclusive jurisdiction of the United States apply to the same crimes by Indians. The word "exclusive" is not a description of the jurisdic-

tion, but rather a description of the law to which the offenders are subject. See *United States v. Kagama,* 118 U.S. 375 at 382.

The federal government does not exercise a "territorial jurisdiction" over Indian country.

The nature of this "jurisdiction" is shown by the fact that the state has "sole jurisdiction" over certain crimes in the Indian country, excluding cessions and treaties. *United States v. McBratney,* 104 U.S. 621, *Draper v. United States,* 164 U.S. 240 [both cases hold that the state had sole jurisdiction of a crime committed by a non-Indian against a non-Indian in the Indian country]; *New York v. Martin,* 326 U.S. 496, *People v. Pratt,* 20 Cal.App.2d 618 [state has jurisdiction over a crime committed by an emancipated Indian in Indian country].

See, also, *Surplus Trading Co. v. Cook,* 281 U.S. 647, 650-651, which states that "reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards".

The historical background supports the conclusion that these statutes did not purport to grant exclusive jurisdiction to the federal courts. These statutes sought to prevent criminals from going unpunished. As is pointed out in *United States v. Kagama,* 118 U.S. 375, at 382, 383, section 1153, Title 18, U.S.C. was enacted after the decision in *In re Crow Dog,* which held that the United States court had *no* jurisdiction over a crime by an Indian since no statute cov-

ered that particular state of facts. The problem has been one of lack of prosecution. See *H.R. Rep. No. 2704,* 57th Congress, 1st Session, page 1, which complains of lax prosecution by the States.

V.

THE FEDERAL GOVERNMENT AND THE STATE OF CALIFORNIA HAVE CONCURRENT JURISDICTION AS TO CERTAIN CRIMES COMMITTED IN "INDIAN COUNTRY".

Certain Indians are in an ambiguous status—they are both wards of the federal government and citizens of the state in which they reside. It will be noted that the statute extending federal jurisdiction over crimes by Indians against other Indians was expressly passed to prevent such crimes from going unpunished. (See *United States v. Kagama,* 118 U.S. 375, 382, 383.) There is nothing in these acts which precludes a state from exercising its criminal jurisdiction over the same criminal act. See *United States v. McGowan,* 302 U.S. 535, which disclaims exclusive jurisdiction. Also, see *Donnelly v. United States,* 228 U.S. 243, which upholds federal jurisdiction against an argument that the state had exclusive jurisdiction. That case, however, does not claim exclusive jurisdiction in the federal courts.

The Indian ward is subject to two jurisdictions; his act may be a crime in each jurisdiction. There are numerous situations where the identical act constitutes a federal and a state crime. An example of concurrent criminal jurisdiction is the case where a harbor pilot is subject to criminal sanctions in both the

federal and state courts for his negligence. (*People v. Welch,* 36 N.E. 328, 141 N.Y. 266 (1894). See, generally, note 16 A.L.R. 1231.)

The mere fact that an act may be a crime under the federal law does not render the state law punishing the same act unconstitutional as an interference with a federal function. *In re Dixon,* 41 Cal.2d 576; *California v. Zook,* 336 U.S. 725, 733; *Nelson v. Pennsylvania,* 350 U.S. 497.

VI.

THE DOCTRINE OF UNITED STATES v. KAGAMA IS OBSOLETE; THUS THERE IS A CONSTITUTIONAL BASIS FOR ONLY A LIMITED FEDERAL JURISDICTION OVER CALIFORNIA INDIANS; THE APPLICABLE STATUTES ARE UNCONSTITUTIONAL AS INTERPRETED AND APPLIED BY THE DISTRICT COURT IN THE CIRCUMSTANCES OF THE PRESENT CASE.

A. Congress does not possess constitutional power to pass a special penal law which applies to California Indians and which excludes application of state law.

If the federal statutes, 18 U.S.C. 1151-1153, 3242 are interpreted as granting exclusive jurisdiction over the crime in this case to federal courts, they are unconstitutional.

Although the federal government may have *concurrent* power, it cannot assert exclusive power over a crime committed by a person of Indian descent, who is subject to no federal restrictions, who lives where he wishes, who is entitled to the full protection of California law, and where the crime is committed on land allotted to an Indian out of the national forest, over which California has never ceded jurisdiction.

There are two possible grounds for ousting the State of California from jurisdiction over the crime of murder.

The first ground is that the federal government has exclusive territorial jurisdiction, e.g., a cession by the state or a military enclave. This is not such a case; California has never ceded jurisdiction over the land concerned in this case.

The only other ground for excluding California from jurisdiction is that California, by exercising criminal jurisdiction, is interfering with a federal function. Federal power over Indians rests on peculiar historical circumstances which no longer exist.

There are four possible sources of federal power over Indian affairs. These four are as follows: (1) the power to make treaties, Art. II, § 2, United States Constitution, (2) the power to regulate commerce "with the Indian tribes", Art. I, § 8, United States Constitution, (3) the power to regulate the use of federal property, Art. IV, § 3, (4) the power to protect "wards" of the federal government. *United States v. Kagama,* 118 U.S. 375. Also see *Williams v. Lee,* ..... U.S. ....., 79 S. Ct. 296, 3 L. ed. 2d 251.

The treaty power has been the basis for many decisions concerning Indian affairs. However, there has never been a treaty between the federal government and any California tribe of Indians.

The commerce power and the power to regulate use of government property have been the constitutional basis for the Indian liquor cases. For example, the

case of *United States v. Nice,* 341 U.S. 591, relies on the power of Congress to regulate commerce with the Indians, and *Hallowell v. United States,* 221 U.S. 317, relies on the power to regulate use of government property. Respondent does not question the power of the federal government to regulate liquor traffic with the Indians. These decisions are inapplicable to the present problem.

The case of *United States v. Kagama,* 118 U.S. 375 discusses the basis of federal power over Indians. That case considers the clause giving Congress power to regulate commerce with the Indians as a possible source of federal power to punish Indian crimes. It expressly rejects that possibility.

The *Kagama* case bases federal power over crimes by Indians upon a wardship theory (118 U.S. at 383). In this regard the court stated as follows:

> "These Indian tribes *are* the wards of the nation. They are *communities dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of local ill feeling, the people of the states where they are found are often their deadliest enemies."

The statements made to support the *Kagama* decision are no longer true today. First, all Indians have been declared citizens of the United States. (§ 43 United States Stats. 253, 8 U.S.C. 604.) Furthermore, Indians residing within the boundaries of California are citizens of the State of California and

entitled to the protection and privileges which flow from that status. (*Anderson v. Mathews,* 174 Cal. 537 [right to vote]; *Piper v. Big Pine School Dist.,* 193 Cal. 664 [right of Indian to send children to nearest state school]; *Acosta v. County of San Diego,* 126 Cal.App.2d 455; also note, 18 *Ops. Cal. Atty. Gen.* 88 [right of reservation Indian to indigent relief, old age assistance and other welfare services]. (Calif. H.C.R. 93, 65.) See *"The Legal Status of the California Indian",* 14 Cal. Law Rev. 83 and 157.)

"The Association on America Indian Affairs" challenges the doctrine that Indians are under federal guardianship and challenges all power exercised under the "wardship" doctrine. It is contended that though Indians may receive special benefits under federal statutes, it does not automatically follow that they become subject to exclusive Congressional control. See *Felix Cohen, Indian Wardship*—the twilight of a myth. The American Indian, Summer 1953.

It is evident that there has been a gradual growth and development in the economic, social, and legal status of Indians in California from a dependent and depressed status in the 1850's to the present full status of citizens and voters, with all the privileges which flow from that status. See Goodrich, *"The Legal Status of the California Indians",* 14 Cal. Law Rev. 83, 157. Also, see House Report 2503, 82nd Congress, 2nd Session.

It has been the policy of both the federal and state governments to make the Indians economically self-

sufficient so that there will be no need for the Bureau of Indian Affairs. See House Report 2503, 82nd Congress, Second Session, pp. 1150-1151 for statistics on employment and education of California Indians. Indeed, the record indicates that Carmen and the other Indians in the North Fork area worked at various odd jobs, such as mining, logging, power line maintenance and as ranch hands.

Rights and obligations have gradually been added to the Indian's bundle of rights and obligations until today his rights are indistinguishable from those of any other citizen. Such an Indian is in fact no more a "ward" of the federal government than a non-Indian war veteran who may be entitled to term insurance, medical and other special benefits from the federal government. *Acosta v. County of San Diego,* 126 Cal.App.2d 455.

Indians have the rights and protection of citizens and likewise they have the responsibilities of citizens. They have the responsibility of abiding by criminal statutes; failure to so abide subjects them to the same penalties to which other citizens are subject.

Congress itself has recognized the change in the condition of the California Indian. It has expressly stated that California has jurisdiction over crimes by Indians in Indian country within the state. (Public Law 280, 1953.)

Indeed, the assertion of exclusive federal power over the present crime in the present state of affairs stands on precarious constitutional grounds.

B. Assuming that Congress possesses constitutional power to enact a penal law which is applicable to California Indians, but not other California citizens, nevertheless, the statute as here applied is unreasonable.

The opinion of *Perrin v. United States,* 232 U.S. 478 at 486, stated that the federal "power is incident only to the presence of the Indians and their *status* as wards of government, it must be conceded that it does not go beyond what is reasonably essential to their protection, . . . and must be founded upon some reasonable basis."

That opinion continues:

> ". . . A prohibition valid in the beginning doubtless would become inoperative when, in the regular course, the Indians were emancipated from federal guardianship and control, a different view would involve an unjustified encroachment upon a power obviously residing in a state."

In the present case there are two factors which when combined make the statute as applied unreasonable. Here we have a person who may live where he pleases. He does not live on a reservation. He is subject to no control by an Indian commissioner (Calif. H.C.R. 65); subject to no control by the Marshal (Calif. H.C.R. 53:2, 65); subject to no control by the tribe. (Calif. H.C.R. 101-103, 131.) He is competent to contract. Defendant, in short, is subject to no restrictions on account of his race. He is an emancipated Indian. The relationship between Carmen and the federal government is based upon his racial descent only.

Also, the locale of the crime was an allotment from the public domain. The allotment was never a part of a reservation or Indian community. It is in fact surrounded by residences of non-Indians, as well as Indians (Calif. H.C.R. 133), the public domain, private holdings, and resorts.

To apply a federal penal statute, to the exclusion of a state statute, to an offense committed by this emancipated Indian in this locale is unreasonable and thus unconstitutional.

CONCLUSION.

It is respectfully submitted that the judgment and order of the District Court be reversed.

Dated, San Francisco, California,
February 24, 1959.

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(Appendix Follows.)

Appendix.

Appendix

EXHIBITS OFFERED AND RECEIVED